Supreme Court, U.S.
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No. 92-6073

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1992

RICHARD L. AUSTIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to
the United States Court of Appeals
for the Eighth Circuit

BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF THE PETITIONER

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QUESTION PRESENTED FOR REVIEW

Whether the Eighth Amendment applies to civil forfeitures and, if so, whether the forfeiture of petitioner's mobile home and automobile body shop is grossly disproportionate to the seriousness of his offense.

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INTEREST OF THE AMICUS

The National Association of Criminal Defense Lawyers ("NACDL") is a District of Columbia non-profit corporation with a membership of more than 7,000 attorneys and 28,000 affiliate members, including representatives from every state. The American Bar Association recognizes the NACDL as an affiliated organization and awards it full representation in its House of Delegates.

The NACDL was founded over twenty-five years ago to promote study and research in the field of criminal defense law; to disseminate and advance knowledge of the law in the field of

criminal practice, and to encourage the integrity, independence and expertise of defense lawyers. Among the NACDL's stated objectives is the promotion of the proper administration of criminal justice.

The NACDL has long been troubled by the ever expanding use of civil forfeiture proceedings in our criminal justice system. We have deep concerns about the fairness and wisdom of some of these laws and the aggressive way they are being used by federal and state prosecutors to inflict punishment without any of the constitutional and procedural protections afforded to criminal defendants.

The single biggest problem with civil forfeitures is that the penalty is inherently likely to be disproportionate to the seriousness of the conduct giving rise to forfeiture. This problem is aggravated by the current system which earmarks forfeited property to support law enforcement efforts — so that enforcement agencies have a powerful economic incentive to seek disproportionately severe forfeitures.

This case affords the Court its first opportunity to place constitutional restraints on the Government's ability to obtain civil forfeitures that are grossly disproportionate to the seriousness of the property owner's misconduct. Consequently, the NACDL has a vital interest in the outcome of this case.[1]

SUMMARY OF ARGUMENT

1. The Eighth Amendment explicitly prohibits the imposition of "excessive fines." The Excessive Fines Clause has a different historical origin and purpose than the Cruel and Unusual Punishments Clause of the Eighth Amendment. The Excessive Fines Clause proscribes excessive, *i.e.*, grossly disproportionate, economic penalties sought by the Government.

[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk pursuant to Rule 36.3 of the Rules of this Court.

Sound policy reasons as well as the history of Anglo-American law support this interpretation of the Clause. As Justice Scalia observed, "[t]here is good reason to be concerned that fines, uniquely of all punishments, will be imposed in a measure out of accord with the penal goals of retribution and deterrence." *Harmelin v. Michigan*, 111 S.Ct. 2680, 2693 n.9 (1991). Because the Government stands to benefit, it makes sense to scrutinize governmental action more closely when it seeks an economic penalty.

This policy concern is particularly acute with respect to forfeiture penalties because under a federal law enacted in 1984 all revenue raised through forfeiture is allocated exclusively for law enforcement purposes.

Despite these easily understood incentives for abuse, the Department of Justice has refused to exercise any control over prosecutorial decisionmaking in this area. Thus, each U.S. Attorney retains unfettered discretion to pursue forfeitures under statutes that are extremely broad. This has resulted in many forfeitures that are, by any reasonable standard, disproportionately severe.

2. Civil forfeitures are "fines" within the meaning of the Eighth Amendment. This Court has stated that, from a constitutional standpoint, there is no difference between fines and forfeitures. Where the Government uses a nominally civil proceeding to confiscate property for the purpose of raising revenue or disabling some individual, Eighth Amendment protections apply. Here, the obviously punitive character of the forfeiture sanction also militates in favor of requiring Eighth Amendment safeguards. While some civil forfeitures may properly be characterized as "remedial," notably forfeiture of criminal proceeds, forfeitures of homes and businesses under 21 U.S.C. § 881(a)(7) based on the theory that they in some manner "facilitated" a drug crime are plainly punitive.

The *in rem* nature of a civil forfeiture proceeding does not obviate the need for constitutional analysis of the forfeiture penalty. Civil forfeitures should not be consigned to a constitutional netherworld where all abuses must be tolerated because in theory the action is against "the offending thing." Rather, the Court should focus on the effect of the forfeiture upon the property owner, as indeed, this Court has always done.

3. This case should be remanded to the trial court for a hearing to determine whether the forfeiture penalty imposed on petitioner, together with his seven year prison sentence, is grossly disproportionate to the seriousness of his offense. Rather than attempting to formulate a test for disproportionality, this Court should merely suggest some of the factors it considers relevant to that determination, as the Third Circuit recently did in *United States v. Sarbello*, No 91-5327 (3d Cir. Feb. 2, 1993).

ARGUMENT

I. THE EIGHTH AMENDMENT APPLIES TO CIVIL FORFEITURES.

1. The Eighth Amendment explicitly provides that "excessive fines" shall not be imposed. This Court has traced the prohibition against excessive fines all the way back to the Magna Carta. Although the members of this Court are divided on the scope and purpose of the Cruel and Unusual Punishments Clause, there is — or ought to be — broad agreement that the Excessive Fines Clause has a different historical pedigree and a different sphere of action than the Cruel and Unusual Punishments Clause. Within its proper sphere, *i.e.*, economic penalties for criminal activity, the Excessive Fines Clause clearly prohibits "excessive" penalties. A more difficult question is what the word "excessive" means in this context. It could be taken to prohibit fines and other economic penalties that are not strictly proportionate to the offense. However, it seems more plausible — and it is certainly more practical — to interpret the

Excessive Fines Clause as proscribing only economic penalties that are *grossly* disproportionate to the seriousness of the misconduct that incurs the penalty.

Sound policy reasons support this interpretation of the Excessive Fines Clause. As Justice Scalia observed in *Harmelin v. Michigan*, 501 U.S. ___, 111 S.Ct. 2680, 2693 n.9 (1991), "[t]here is good reason to be concerned that fines, uniquely of all punishments, will be imposed in a measure out of accord with the penal goals of retribution and deterrence." While incarceration costs the Government money, "fines are a source of revenue." And "it makes sense to scrutinize governmental action more closely when the State stands to benefit." *Id.*

Under a federal law enacted in 1984, forfeited assets no longer go into the general Treasury. Instead, the property (or the money derived from its sale) is allocated exclusively for law enforcement purposes. *See* 28 U.S.C. § 524. This dubious system has now spread to most states as well. It provides an undue incentive to seek forfeiture penalties which are not in the interests of justice solely for the purpose of raising revenue for law enforcement agencies. And this has happened day after day at both the federal and state level. Through the federal Government's "equitable sharing program" the particular state or local police department or sheriff's office that turns seized assets over to the federal authorities for forfeiture is rewarded with up to 85 percent of the money obtained from the sale of the forfeited property. *See* 19 U.S.C. § 1616; Attorney General's Guidelines on Seized and Forfeited Property. The Justice Department has shared around one billion dollars with state and local police agencies since the equitable sharing program began in 1985. On the state level, many prosecutors' offices are also being heavily funded with forfeiture revenues.[2] So not only

[2] Oklahoma County District Attorney Bob Macy recently was quoted in the press blaming his office's budget shortfall on declining revenues from forfeiture cases. The office's budget was $3,365,587 in 1992, of which

police agencies but even prosecutors are in thrall to a reward system that resembles bounty-hunting.[3] Accordingly, the concerns expressed by Justice Scalia in *Harmelin* are particularly acute in the forfeiture area.

Given the incentives for abuse, the Department of Justice should long ago have issued guidelines to place some limits on prosecutorial discretion in seeking civil forfeitures. But, despite mounting criticism, the Department has steadfastly refused to exercise any control over prosecutorial decisionmaking in this area. Each U.S. Attorney retains unfettered discretion to seek forfeiture pursuant to statutes that are extremely broad in scope. 21 U.S.C. § 881(a)(7) is not the only such statute. The Government has sought civil forfeiture of entire businesses under 18 U.S.C. § 981 in cases where the owner of the business violated the "money laundering" statutes, for example, by skimming cash receipts and depositing the money in a company account.

$350,000 came from forfeitures. In 1991, forfeitures accounted for $685,730 in funding for the office. Macy blamed the decline in his forfeiture revenues on local police agencies who chose to turn their forfeiture cases over to the federal authorities so the police could get a larger share of the property than they would in state court, where the loot has to be shared with the prosecutor's office. "Macy Seeks Ways To Handle Budget," *The Daily Oklahoman*, January 1, 1993, p. 19. Macy is the current President of the National District Attorneys Association (NDAA).

[3] The incentives for abuse are not merely pecuniary. United States Attorney's offices are given more prosecutor slots based on the number of cases brought in the previous year. The Department of Justice considers forfeiture statistics in deciding how many slots to allocate to each office. U.S. Attorney's offices in areas with little serious criminal activity, such as South Dakota, are typically overstaffed for political reasons. Those offices have an incentive to pursue forfeitures that are not in the interest of justice in order to "justify" their high staffing levels. The United States Attorney's Office for the District of South Dakota has sought Draconian forfeitures in cases involving minor drug activity. *See* "Where the Innocent Lose," *Newsweek*, January 4, 1993, p. 42. This article emphasizes that while "[m]ost forfeiture victims aren't exactly model citizens, . . . the penalty they suffer often far exceeds the alleged misdeed."

See 1 D. Smith, *Prosecution and Defense of Forfeiture Cases*, ¶5.01[1], at 5-10 (Dec. 1992 ed.). 18 U.S.C. § 981 and the "money laundering" statutes are so broadly written that they positively invite prosecutorial overreaching. *See also* John K. Villa, *Banking Offenses*, Ch. 6 & 8 (1991). So-called "money laundering" can be charged in almost any federal criminal case and drastic forfeiture consequences ensue. Despite a long record of abusive prosecutions under these statutes, Congress keeps expanding them at the Department's behest rather than cutting back.

The Department of Justice can avoid disproportionately severe forfeitures through the administrative remission and mitigation process. However, the remission and mitigation process has atrophied in the past decade. The Department of Justice's enforcement policies have instead become harsher and harsher. Relief is so rarely granted to anyone except banks and wholly innocent lienholders that knowledgeable attorneys consider it a waste of time to seek remission or mitigation of the forfeiture penalty. It may be that because of the change in Administration and the increasing criticism of its forfeiture efforts, the Department is now going to use the remission and mitigation process to better effect. We certainly hope so. *See* 2 D. Smith, *Prosecution and Defense of Forfeiture Cases*, ¶15.04. However, even if this happens, we have learned from sad experience that the administrative clemency process is no substitute for constitutional or statutory safeguards against abuse.

The Court should not underestimate the importance of an Eighth Amendment excessiveness analysis in curbing potentially abusive *state* forfeiture proceedings. Though excessive federal forfeitures may well have been tempered by the professionalism of U.S. Attorneys' offices, the monetary success of federal forfeiture has interested states in expanding their forfeiture statutes. We have not yet experienced the full wrath of an

"updated" approach to state forfeitures. For example, one model state forfeiture law, authored by the National Drug Prosecution Center in 1991 and currently being pushed in numerous cash-starved state legislatures, would permit the state to forfeit any of a drug smuggler's property up to the value of the commercial airliner on which the smuggler purchased a ticket to travel.[4] The Eighth Amendment must remain available to protect against these excesses on the horizon.

2. We think it obvious that civil forfeitures are "fines" within the meaning of the Eighth Amendment. In *United States v. United States Coin & Currency*, 401 U.S. 715, 718 (1971), this Court stated:

> From the relevant constitutional standpoint there is no difference between a man who "forfeits" $8,674 because he has used the money in illegal gambling activities and a man who pays a "criminal fine" of $8,674 as a result of the same course of conduct. In both instances, money liability is predicated upon a finding of the owner's wrongful conduct; in both cases, the Fifth Amendment applies with equal force.

If there is no difference between civil forfeitures and fines for Fifth Amendment purposes, it is difficult to see how there could be a difference between civil forfeitures and fines under the Excessive Fines Clause of the Eighth Amendment.

In *Browning Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 271-76 (1989), the Court held that punitive damages obtained in a private civil action were not "fines" within the meaning of the Eighth Amendment. However, the Court reached that result precisely because the *Govern-*

[4] National Conference of Commissioners on Uniform State Laws, *Draft Amendments to the Uniform Controlled Substances Act*, prefatory note at 7 (Dec. 4, 1992) (criticizing National Drug Prosecution Center, *Model Asset Seizure and Forfeiture Act* § 14(a) & comment (1991)).

ment was not the plaintiff and there was no incentive for the State to abuse the punitive damages remedy. The Court emphasized that the Government of Vermont had not "taken a positive step to punish, as it most obviously does in the criminal context, *nor has it used the civil courts to extract large payments or forfeitures for the purpose of raising revenue or disabling some individual.*" 492 U.S. at 275 (emphasis supplied). *See Harmelin v. Michigan, supra*, 111 S.Ct. at 2693 n.9. Here, the reasoning of *Browning Ferris Industries* supports the contrary result. The Government is the plaintiff and there is a tremendous and easily understood "incentive for abuse." *Id.*

The lower courts are in agreement that the Eighth Amendment applies to criminal forfeitures. A criminal forfeiture may be imposed only after the criminal defendant is convicted of a crime triggering the forfeiture. All of the procedural safeguards of the criminal process apply to criminal forfeitures. Because the Government's burden of proof in a federal civil forfeiture case is merely to show probable cause — the courts have held that that minimal burden may be met entirely with rank hearsay evidence — and because claimants in a civil forfeiture proceeding do not have the procedural rights afforded a criminal defendant (including the right to appointed counsel if one is indigent) the chance that justice will miscarry is much greater in the civil than in the criminal forfeiture context. It is therefore all the more important that some constitutional protection be provided against disproportionately severe civil forfeitures. *United States v. On Leong Chinese Merchants Ass'n Building*, 918 F.2d 1289, 1299 (7th Cir. 1990), *cert. denied*, 112 S.Ct. 52 (1991) (Cudahy, J., concurring) ("It would defy common sense to prohibit disproportionate forfeiture of the property of a defendant who has been convicted of a criminal violation while placing no limits on the power of the government to seize any real estate related to an offense in an ostensibly civil *in rem* action"). *See also United States v. $12,390*, 956 F.2d 801, 807-12 (8th Cir. 1992) (Beam, J. dissenting).

Like the Double Jeopardy Clause, which this Court held applicable to civil penalties in *United States v. Halper*, 490 U.S. 435 (1989), the Eighth Amendment is a "personal" and "humane" limitation on the power of the Government to punish an individual. As such, it should also be applicable to civil forfeiture sanctions that are punitive in nature. *United States v. Certain Real Property and Premises Known as 38 Whalers Cove*, 954 F.2d 29, 35 (2d Cir. 1992). *See also In re Winship*, 397 U.S. 358, 365-66 (1970) (the Court declined to allow the state's "civil labels and good intentions" to "obviate the need for criminal due process safeguards in juvenile courts.").

3. The Eighth Circuit panel urged Congress to enact statutory safeguards against disproportionately severe civil forfeitures pursuant to 21 U.S.C. § 881(a)(7)[5] but it mistakenly believed that the Eighth Amendment does not apply to civil forfeitures. The court of appeals adopted the reasoning of a Ninth Circuit case holding that the Eighth Amendment was not applicable to an *in rem* forfeiture because the proceeding is, in theory, against the "offending" property, not the owner of the property. The court reasoned that "'[i]f the constitution allows *in rem* forfeiture to be visited upon innocent owners ... the constitution hardly requires proportionality review of forfeitures ...'" 964 F.2d at 817, quoting *United States v. Tax Lot 1500*, 861 F.2d 232, 234 (9th Cir. 1988), *cert. denied*, 493 U.S. 954 (1989).

The court of appeals plainly thought the Eighth Amendment should apply to civil actions brought by the Government that result in harsh penalties. And the court agreed with the Ninth Circuit that it is incongruous to "'require[] proportionality review for forfeitures when the government proceeds *in personam*, but not when the government proceeds *in rem*.' Legal

[5] We have no expectation that the Congress would be willing to provide statutory safeguards against abuse of this or any other civil forfeiture statute. Few members of Congress are knowledgeable about forfeitures and there is a widespread reluctance to pass legislation that could expose members to criticism, however unfounded, that they are "soft" on crime.

niceties such as *in rem* and *in personam* mean little to individuals faced with losing important and/or valuable assets." *Id.* at 817-18, *quoting United States v. Tax Lot 1500, supra*, 861 F.2d at 234.

Nonetheless, the court thought itself constrained "by the technical legal distinctions regarding *in personam* and *in rem* actions" and by the decisions of other circuit courts holding that the Eighth Amendment does not apply to *in rem* civil forfeitures. 964 F.2d at 818.[6]

The court of appeals erred in holding that the ancient fiction that a civil forfeiture action is against the offending property, rather than against the owner of the property, prevents proportionality principles from being applied. This Court has repeatedly rejected the same argument in holding that other constitutional protections do apply to *in rem* civil forfeiture proceedings. Thus, the Court has held that the evidence seized in violation of the Fourth Amendment must be excluded from civil forfeiture proceedings which are quasi-criminal in nature, *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965), and that the Fifth Amendment privilege against compelled self-incrimination applies in the *in rem* civil forfeiture context, *United States v. United States Coin & Currency*, 401 U.S. 715, 718-22 (1971); *Boyd v. United States*, 116 U.S. 616 (1886).

In holding that Eighth Amendment protections apply to civil forfeitures, the Second Circuit rejected the notion that the

[6] The court of appeals was not aware of the then recent decision of the Second Circuit in *United States v. Premises Known as 38 Whalers Cove*, 954 F.2d 29 (2d Cir. 1992), which held that Eighth Amendment protections do apply to civil forfeiture proceedings. The decisions from other circuit courts addressing this issue contain little or no analysis and either antedate this Court's decisions in *Halper*, *Browning Ferris Industries* and *Harmelin* or ignore those decisions. *See* 2 D. Smith, *Prosecution and Defense of Forfeiture Cases*, ¶13.05.

in rem character of the proceedings obviates the need for constitutional analysis of the penalty. The Second Circuit stated:

> In evaluating whether a forfeiture under 881(a)(7) serves its ostensible goals, we focus upon the effects on the claimant who has violated the statute, despite the fact that the forfeiture actions are brought *in rem*. *See Livonia Road*, 889 F.2d at 1270. *See also U.S. v. Huber*, 603 F.2d 387, 397 (2d Cir. 1979), *cert. denied*, 445 U.S. 927, 100 S.Ct. 1312, 63 L.Ed.2d 759 (1980) (for Eighth Amendment purposes, "there is no substantial difference between an *in rem* proceeding and a[n *in personam* criminal] forfeiture proceeding brought directly against the owner"); *cf. United States v. U.S. Coin & Currency*, 401 U.S. 715, 718, 91 S.Ct. 1041, 1043, 28 L.Ed.2d 434 (1971).

38 Whalers Cove, 954 F.2d at 36.

4. We recognize that there is some tension between this Court's decision in *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974), and the proposition we advance here. In *Calero-Toledo* the Court held that an innocent party could be deprived of its property without contravening the Just Compensation Clause of the Fifth Amendment. Although the Court's opinion does not discuss the nature of the offense that resulted in the seizure of the yacht, Justice Douglas' dissent states that a single marijuana cigarette was found on board. He also emphasized that there was no evidence the yacht leasing company was negligent. 416 U.S. at 692. In upholding the forfeiture of the yacht, the Court relied heavily upon the personification fiction, *i.e.*, the notion that the property is the offender.

The Court's decision in *Calero-Toledo*, which relies almost entirely on hoary precedent, needs to be reexamined in light of the vastly increased role that civil forfeitures now play in law enforcement. At the time the case was decided "forfeitures appeared to be an obscure backwater of the law. Had the

federal government pursued forfeitures as aggressively then as it does now, the Court might have subjected forfeitures to the same scrutiny as criminal procedure." 1 D. Smith, *Prosecution and Defense of Forfeiture Cases*, ¶1.02, at 1-16. Significantly, 21 U.S.C. § 881(a)(7), the statute that authorizes civil forfeiture of real estate for drug offenses, was not enacted until 1984. In 1974, when the *Calero-Toledo* case was decided, forfeitures were limited to cars, vessels and the occasional airplane used to smuggle drugs. Moreover, neither the federal government nor state authorities pursued a "zero tolerance" policy in forfeiture cases. The facts in *Calero-Toledo*, which arose in Puerto Rico, were unquestionably aberrational at the time.

Moreover, as Judge Aspen has astutely remarked, if the Court's decision in *Calero-Toledo* rests upon the personification fiction then the logic of the constitutional defense to forfeiture carved out by the Court in that case is not readily apparent.[7] "If the *res* really is the offender, then there is no reason to consider the conduct of the property owner. This would indicate that at the edges, at least, the *in rem* fiction begins to break down." *United States v. One 1988 Ford Mustang*, 728 F.Supp. 495, 498 n.2 (N.D.Ill. 1985).[8]

The facts of *Calero-Toledo* may be more troublesome than the Court's reliance upon the personification fiction. If the Eighth Amendment applies to civil forfeitures it would have to, at a minimum, prevent forfeiture of a valuable yacht owned by

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[7] The Court stated that "it would be difficult to reject the constitutional claim of an owner . . . who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property; for in that circumstance, it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive." 416 U.S. at 688-90.

[8] Judge Aspen also noted the difficulty of reconciling the Court's earlier decision in *Plymouth Sedan* with the personification fiction. In his view, criminal and civil forfeitures should be treated the same way for Eighth Amendment purposes.

an innocent and non-negligent party where the act triggering the forfeiture is the possession on the yacht of a single marijuana cigarette by the owner's lessee. Yet no justice suggested that the forfeiture of the yacht violated the Eighth Amendment. The easy answer is that the yacht leasing company did not raise any Eighth Amendment challenge to the forfeiture.

II. THE CASE SHOULD BE REMANDED TO THE TRIAL COURT FOR A HEARING TO DETERMINE WHETHER THE FORFEITURE PENALTY IS GROSSLY DISPROPORTIONATE TO PETITIONER'S OFFENSE.

Assuming this Court agrees with our view of the Eighth Amendment's scope, the more difficult undertaking is to formulate a coherent test of proportionality. Two recent cases, *38 Whalers Cove*, *supra*, and *United States v. Sarbello*, No. 91-5327 (3d Cir. Feb. 2, 1993) represent the circuit courts' most serious efforts in this regard.

United States v. Sarbello, No. 91-5327 (3d Cir. Feb. 2, 1993), a criminal forfeiture under RICO[9], involved the forfeiture of the defendant's entire interest in API — a legitimate corrugated box manufacturing enterprise. Although the jury found that only 10% of the API assets were criminally tainted, § 1963(a)(3) required forfeiture of Sarbello's entire interest in the business (approximately 67%). Thus the court was faced with the question of whether the Eighth Amendment permits the reduction of an otherwise mandatory 100% statutory forfeiture on the basis of disproportionality.

The Third Circuit held that the Eighth Amendment requires the court to proportion its forfeiture orders to the seriousness of the underlying offense. *United States v. Sarbello*, No. 91-5327, slip op. at 19 (3d Cir. Feb. 2, 1993). Upon the defendant's "*prima facie* showing that the § 1963(a)(2) sentence is grossly

[9] 18 U.S.C. § 1963(a)(3).

disproportionate, or bears no close relation to the seriousness of the crime," some proportionality analysis would be mandated. *Id.* In the court's view, the defendant's *prima facie* showing could be satisfied by a factual determination at the defendant's request, pursuant to Fed. R. Crim. P. 31(e), which would permit a comparison of the defendant's ownership interest and the extent to which the assets were criminally tainted.

The significance of *Sarbello* lies primarily in the Third Circuit's articulation of factors relevant to an Eighth Amendment proportionality analysis. The court explained that although a district court's proportionality analysis will not in every case be extensive or encompass the three factors set forth in *Solem*, it

> must necessarily accommodate the facts of the case and weigh the seriousness of the offense, including the moral gravity of the crime measured in terms of the magnitude and nature of its harmful reach, against the severity of the criminal sanction. Other helpful inquiries might include an assessment of the personal benefit reaped by the defendant, the defendant's motive and culpability, and, of course, the extent that the defendant's interest and the enterprise itself are tainted by criminal conduct.

Id. at 20. Recognizing the need for intensive case-by-case factual determinations, the court remanded so that the district court could conduct a proportionality analysis consistent with its opinion. *Id.* at 23.

While *Sarbello* involved a criminal forfeiture, its articulation of relevant factors is equally applicable to civil forfeitures. However, the factors noted in *Sarbello* should not be regarded as exclusive. For example, where the property owner is also convicted and sentenced to a term of imprisonment and/or a fine his total punishment for the offense should be considered in determining whether the forfeiture penalty sought is grossly

disproportionate. Indeed, the court ought to consider the forfeiture penalty when determining an appropriate sentence. *See United States v. Porcelli*, 865 F.2d 1352, 1366 (2d Cir. 1989); *United States v. Horak*, 833 F.2d 1235, 1252 (7th Cir. 1987); *United States v. Busher*, 833 F.2d 1409, 1415-16 (9th Cir. 1987); *United States v. L'Hoste*, 609 F.2d 796, 813 (5th Cir.), *cert. denied*, 449 U.S. 833 (1980). As Excessive Fines Clause jurisprudence is undeveloped the prudent course in this case is to remand for a hearing on whether the forfeiture of petitioner's mobile home and auto body shop business is grossly disproportionate.

Eighth Amendment proportionality was also addressed by the Second Circuit in *38 Whalers Cove*, a facilitation case under 21 U.S.C. § 881(a)(7). The court recognized that the Eighth Amendment applies to civil forfeitures serving retributive or deterrent purposes rather than remedial goals. *38 Whalers Cove*, 954 F.2d at 35. Analogizing to *Halper*, the court placed the burden upon the claimant to show that the defendant property was not an instrumentality of crime *and* that its total value was "overwhelmingly disproportionate to the value of the controlled substances involved in the statutory violation." Upon a claimant's showing of disproportionality, the Government may then "present its costs of investigation and detection, as well as other costs and damages attributable to the misconduct of the claimant" in rebuttal. *Id.* at 37.

The Second Circuit did not remand and require the government to carry its burden of showing that the forfeiture was justified as civil and remedial in nature. The court remarked that even "assuming *arguendo* that following a government accounting the district judge would conclude that the forfeiture, even up to the full amount of Levin's equity interest in the condominium, amounted to punishment and not a civil sanction, the judgment would still survive scrutiny."[10] *Id.* The Second Circuit's nig-

[10] It is significant to note that although Levin mentioned that the Excessive Fines Clause might apply to purely civil sanctions, he did not sufficiently emphasize that position on appeal. Consequently, the Second Circuit declined to address the issue. 954 F.2d at 38 n.3. Levin's forfeited interest in the residence was close to three hundred times the value of the cocaine ($250) sold inside it.

gardly application of Eighth Amendment principles makes it difficult to imagine what magnitude of disproportionality would fail its test. Although the court identified as relevant the three proportionality factors discussed in *Solem v. Helm*, 463 U.S. 277, 290-92 (1983), its application of those factors was too cursory to be instructive. The court merely observed that "the imposition of the equivalent of a $68,000 fine in this case, while large, is not a grossly disproportionate punishment within the meaning of the Eighth Amendment jurisprudence."

While we do not suggest a specific conclusion as to the proportionality of the forfeiture at issue in *38 Whalers Cove*, we do question the validity of the court's Eighth Amendment proportionality analysis. The court provided no criteria for determining what amounts to an "instrumentality" of crime, though that is its threshold inquiry. Moreover, predicating its rebuttable presumption on a concept of government cost accounting is fraught with practical difficulties. Under the Second Circuit's formulation, the courts might become mired in voluminous time and attendance records for government agents and employees to determine whether a given forfeiture violated a claimant's Eighth Amendment rights. Such an inquiry hardly seems relevant to an assessment of disproportionality. Ultimately, the government's conduct, rather than the claimant's, would determine the magnitude of permissible forfeitures. This is not the "personal" and "humane" limitation on the Government's power to punish embodied in the Eighth Amendment.

This Court should adopt the *Sarbello* approach to adjudicating Eighth Amendment proportionality cases. In contrast to the Second Circuit's approach, the *Sarbello* analysis permits

the district courts, on a case-by-case basis, to determine and weigh factors relevant to proportionality. This methodology is analogous to the approach adopted by Congress and the U.S. Sentencing Commission in § 5E1.2(d) of the United States Sentencing Guidelines concerning "Fines for Individual Defendants".

CONCLUSION

For the foregoing reasons, the NACDL as amicus curiae respectfully urges this Court to reverse the decision of the court of appeals and to remand the case for a hearing to determine whether the forfeiture penalty suffered by petitioner is grossly disproportionate to the seriousness of his offense.

Respectfully submitted,

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February, 1993

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CERTIFICATE OF SERVICE

It is hereby certified that both parties to this case have been served three copies of the Brief Amicus of National Association of Criminal Defense Lawyers in Support of Petitioner by mail on February 26, 1993.

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